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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

ALUMINUM COMPANY OF AMERICA,
Petitioner,

vs.

SAM H. LOVEDAY et al.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Aluminum Company of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on December 31, 1959.

OPINIONS, JUDGMENTS AND ORDERS BELOW.

Copy of the opinion of the District Court[1] on motions for new trials and copy of judgments of the District Court granting certain of said motions for new trials are appended in the appendix hereto (A. 1a, 14a).[2] Included in

[1] The District Court and the Trial Court referred to in this petition, unless otherwise indicated, is the United States District Court for the Eastern District of Tennessee, Northern Division.

[2] The abbreviation "A." refers to the appendix to this petition.

such appendix is the judgment of the Court of Appeals (A. 18a). The opinion of the Court of Appeals has not been published but such opinion is set forth in the appendix hereto (A. 19a).

Upon motion made by petitioner, said Court of Appeals stayed its mandate on said judgment upon condition that a petition for writ of certiorari be filed with this Court.

JURISDICTION.

Jurisdiction to review by writ of certiorari the judgment of said Court of Appeals entered December 31, 1959, is invoked under the provisions of 28 U. S. C. A., Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

Question One. After a jury trial in a United States District Court does the Trial Judge have the power to grant a new trial solely on the basis of affidavits and testimony of jurors relating to a remark of a juror made in the jury room during the jury's deliberations?

Question Two. If a United States District Court grants a new trial without having the power to do so is such order appealable prior to a retrial?

STATEMENT OF THE CASE.

I.

Bases for Federal Jurisdiction in the United States District Court.

The bases for Federal jurisdiction in the United States District Court of the original complaint were diversity of citizenship between the plaintiffs and the defendant and the amount involved.

II.

Status of the Litigation.

This litigation in the Trial Court involved 75 separate causes of action asserted by some 170 different individuals who sought to recover from the petitioner-defendant, Aluminum Company of America, claimed damages to vegetation, livestock and farm lands allegedly caused by fumes emitted from the smelting and fabricating plants of petitioner-defendant located at Alcoa, in Blount County, Tennessee (R. 250a).[3]

This unique litigation resulted in the longest jury trial that has ever been tried in the District Court of the United States for the Eastern District of Tennessee, Northern Division. The trial was continuous for more than three months and the Court was in session from six to seven hours practically every trial day (R. 251a).

The farms involved are located in Blount County, Tennessee, and lie in all directions from the plants of petitioner-defendant and range in distance from two miles to fourteen miles from the smelting plant, which was the principal plant involved. The original plaintiffs included not only the owners of farm lands but also additional persons who were tenants on some of the farms or who owned livestock kept on some of the farms. Every type of farming operation was involved, including dairying operations, beef feeder operations, the raising and selling of registered dairy cattle, the raising and selling of registered beef cattle, grain and row crop farming operations, hog, sheep and horse operations, as well as operations involving the growing and selling of timber (R. 251a).

132 witnesses testified and 426 exhibits were filed. Included in the subjects of testimony were civil engineering,

[3] The abbreviation "R." used herein refers to the certified record filed in this Court.

chemical engineering, plant pathology, chemistry, botany, agronomy, veterinary science, animal husbandry, animal pathology, dairy husbandry, biochemistry, meteorology, air pollution, real estate valuations and cattle appraisals (R. 252a).

In view of the complex nature of this litigation and the multitudinous issues which were to be presented to the jury, the Trial Court (having theretofore denied motion of petitioner-defendant for severance of the individual causes of action) directed that the trial be divided into two phases.

In Phase I, which phase consumed four weeks of trial time, the jury was asked to decide whether petitioner-defendant had maintained a nuisance to the injury and damage of any of the plaintiffs and, if so, whether the nuisance had been abated and, if abated, the date upon which such abatement had taken place. The jury found that petitioner-defendant had maintained a nuisance with respect to one or more of the plaintiffs but further found that the nuisance had been abated on August 17, 1955 (R. 252a).

In Phase II the jury was asked to decide whether the plaintiff in each separate cause of action had suffered any damage as a result of the temporary nuisance and, if so, the amount of such damage.

During the first portion of Phase II of this litigation the causes of action were tried in groups of five and under this procedure twenty verdicts were rendered during a four weeks period. Thereafter in Phase II the causes of action were tried one at a time and forty-three separate verdicts were rendered under this procedure. Judgments were entered upon all the verdicts rendered (R. 252a).

The net result of the entire proceedings during Phase II was that twenty verdicts were rendered for the defendant (in which the plaintiffs were denied any recovery

whatsoever); forty-three verdicts were rendered for the plaintiffs (in which recoveries were awarded ranging from $300.00 to $4,550.00); upon motions of the plaintiffs nine causes of action were dismissed with prejudice; and the Court permitted three causes of action to be dismissed without prejudice (R. 253a).

Motions for new trials were filed by the plaintiffs in all of the causes of action which were tried, with the exception of one. However, more than half of these motions were voluntarily withdrawn by the plaintiffs. Hence the Trial Court considered twenty-nine motions for new trials and granted fifteen of such motions. The basis upon which such new trials were granted was that during the jury's deliberations one of the jurors remarked to the other jurors that he had, during a week end while the trial was in progress, driven to a restaurant located in the vicinity of some of the plaintiffs' farms, had seen some cattle as he drove along the highway and that such cattle appeared to be in good condition (R. 237a). From the order granting the fifteen new trials petitioner-defendant perfected its appeal to the United States Court of Appeals for the Sixth Circuit and also filed a petition for certiorari with such Court of Appeals. The Court of Appeals dismissed the appeal, denied the petition for writ of certiorari and affirmed the judgment of the District Court. Petitioner is now filing this petition for a writ of certiorari to review the action of the Court of Appeals.

III.

Facts Relating to the Ground for Granting the Fifteen New Trials.

Plaintiffs, in support of their motions for new trials, filed affidavits of two jurors setting forth in effect that juror E. E. Hartman had remarked to his fellow jurors during the jury's deliberations that he had driven in

Blount County, Tennessee, had observed from his moving car unidentified cattle from a public road and had never seen finer looking animals anywhere (R. 204a-207a).

Juror Hartman was not on the trial jury during Phase I of the law suit but only an alternate juror at that time. Mr. Hartman did not enter the jury box or participate in the jury's deliberations until after the verdict in Phase I had been rendered and verdicts had been rendered in fifteen individual causes of action in Phase II (R. 17a, 21a, 255a).

At the hearing on the motions for new trials the Trial Court, over the objection of the petitioner-defendant, permitted juror Hartman and two other jurors to testify concerning the remark which was made by juror Hartman in the jury room during the course of the jury's deliberations (R. 208a-226a, 236a).

Juror Hartman testified that on two different occasions after he had become a juror he, together with his wife, drove from his home in Knoxville, Tennessee, to Spikes Restaurant to have dinner. This was approximately three years after the complete abatement of the nuisance. Spikes Restaurant is located on a main highway in Blount County, Tennessee, near the airport serving Knoxville, Tennessee, and in the general vicinity of the plants of petitioner-defendant. On one of these occasions he slowed, but did not stop, his car and looked at some cattle in a field. He testified that he did not know whose cattle he had observed and did not know whether they were involved in the litigation. On his second trip to the same restaurant, Mr. Hartman did not even slow down his car. At no time did Mr. Hartman stop his car or make any inspection of any cattle. He testified that he traveled to the restaurant over highways that a person would normally use for travel from his home in Knoxville, Tennessee, to the restaurant. Such highways are heavily traveled by persons going from

Knoxville to the Knoxville airport, to Alcoa, Tennessee, and Maryville, Tennessee, and to many other towns and communities located south of Knoxville. Mr. Hartman also testified that he and his wife had on frequent occasions prior to the trial of this litigation made other trips to the same restaurant for the same purpose (R. 210a-216a).

The Trial Court did not grant the fifteen new trials on the ground that Mr. Hartman had made trips to Blount County during the course of the trial, nor on the ground that such trips influenced Mr. Hartman's deliberations as a juror. Such new trials were granted solely on the ground that Mr. Hartman informed the jury of his trips to Blount County. The Trial Court stated:

> "If the juror had not conveyed to his fellow jurors that which he learned from his own inspections, under some of the decisions discussed by counsel here today, there would be a serious question as to whether the Court should grant a new trial. But the juror, as indicated, conveyed that which he learned to his fellow jurors thus presenting to his fellow jurors evidence which they had not heard in open court and evidence about which the juror could not be examined or cross-examined" (A. 11a; R. 237a).

The Trial Court heard testimony as to the date upon which Mr. Hartman made his remark in the jury room during the jury's deliberations (R. 218a-225a), concluded that such remark was made on or about June 23, 1958, and granted new trials to those plaintiffs whose causes of action were tried on and after that date (R. 242a-243a). However, new trials were not granted in a number of causes of action tried after June 23, 1958, and such causes of action were not involved in the appeal to the Court of Appeals, because the plaintiffs in those actions accepted the amounts awarded by the jury and withdrew their motions for new trials (R. 256a).

ARGUMENT— REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals Has Decided a Vitally Important Question Involving the Sanctity of a Jury's Deliberations.

The fundamental error in the holding of the Trial Court, we submit, is that it considered affidavits of jurors, and permitted jurors to testify, concerning events that transpired in the jury room during the jury's deliberations. In other words, the Trial Court permitted jurors to impeach their own verdict.

The Trial Court obtained its information concerning juror Hartman's visits to Blount County, Tennessee, solely and alone from jurors who related what transpired in the jury room. Only after certain jurors disclosed a remark that occurred in the jury room during the jury's deliberations did the Trial Court ask juror Hartman concerning his visits.

The Court of Appeals, in its opinion, in effect recognized the long established rule that a juror may not impeach his own verdict by revealing proceedings in the jury room. However, the Court of Appeals held that such rule was not applicable in the instant case on the ground that the juror, by viewing the cattle disqualified himself to sit as a juror. The fact remains, however, that the only means by which the Trial Court ascertained what the juror did was by considering affidavits and hearing testimony of jurors concerning matters that occurred within the secrecy and sanctity of the jury room.

This Court has repeatedly held that such sanctity of the jury room must not be violated. In **McDonald v. Pless** (1915), 238 U. S. 264, this Court, in holding that a juror cannot impeach his verdict, stated (p. 267):

". . . When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial, the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what happened in the jury room.

"These two conflicting considerations are illustrated in the present case. If the facts were as stated in the affidavit, the jury adopted an arbitrary and unjust method in arriving at their verdict, and the defendant ought to have had relief, if the facts could have been proved by witnesses who were competent to testify in a proceeding to set aside the verdict. But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference."

The necessity of protecting the secrecy of the jury's deliberations and protecting the jurors from inquisition is so necessary in the preservation of a sound jury system that this Court has applied the rule even in criminal cases where the rights of personal liberty are at stake. In **Stein v. New York** (1953), 346 U. S. 156, this Court stated (p. 178):

"Nor have the courts favored any public or private post-trial inquisition of jurors as to how they reasoned, lest it operate to intimidate, beset and harass them. This Court will not accept their own disclosure of forbidden quotient verdicts in damage cases, McDonald v. Pless, 238 U. S. 264, 59 L. ed. 1300, 35 S. Ct. 783. Nor of compromise in a criminal case whereby some jurors exchanged their convictions on one issue in return for concession by other jurors on another issue. Hyde v. United States, 225 U. S. 347, 56 L. ed. 1114, 32 S. Ct. 793, Ann. Cas. 1914A 614. . . .

"But this inability of a reviewing court to see what the jury has really done is inherent in jury trial of any two or more issues, and departure from instruction is a risk inseparable from jury secrecy and independence. . . ."

In **Orenberg v. Thecker** (D. C. C. A., 1944), 143 F. 2d 375, the facts presented even a stronger case of alleged influence on the jury by misconduct of two jurors than the facts presented in the instant case. In the **Orenberg** case affidavits were submitted in support of a motion for new trial which stated that during the trial two jurors visited the scene of the accident involved, that one of the jurors made observations, inspections and experiments, and that both jurors reported their observations to the other jurors. The Court of Appeals, in holding that the Trial Court correctly denied a motion for new trial based upon such alleged misconduct, said (p. 376):

"In Economon v. Barry-Pate Motor Co., Inc. [3 F. 2d 84], we said: 'In unmistakable language both this court and the Supreme Court of the United States have held the general rule to be that the testimony of jurors will not be received to impeach their verdict, unless such testimony relates to extraneous influences brought to bear upon them.' In the present case no extraneous

influences, of the kind contemplated by the decisions of this court and of the Supreme Court, were brought to bear upon the jurors . . . That the Supreme Court, in the McDonald case, did not overlook the arguments advanced by appellants in support of their motion is shown by the following additional language: 'And, of course, the argument in favor of receiving such evidence is not only very strong but unanswerable—when looked at solely from the standpoint of the private party who has been wronged by such misconduct. The argument, however, has not been sufficiently convincing to induce legislatures generally to repeal or to modify the rule. For, while it may often exclude the only possible evidence of misconduct, a change in the rule "would open the door to the most pernicious arts and tampering with jurors". "The practice would be replete with dangerous consequences." "It would lead to the grossest fraud and abuse" and "no verdict would be safe." ' It is not necessary to say more or to consider whether it would be reasonable to require jurors, during the course of a trial, to go by roundabout routes, avoiding main traveled streets, or to close their eyes to traffic controls on such streets."

Other authorities setting forth the same principle are:

Eagle Lake Improvement Co. et al. v. United States (1947), 160 F. 2d 482;

Rakes v. United States (1948), 169 F. 2d 739;

Northern Pacific Railway Company v. Mely (1954), 219 F. 2d 199.

In the **Northern Pacific Railway** case, supra, the Court, in holding that jurors cannot impeach their verdicts, set forth in two footnotes (p. 202) some of the reasoning behind this mandatory and essential rule:

"With our ultramodern genius for attempting to remove the luster from solid gold, the ethical and spiritual significance of a jury verdict has been almost

destroyed. If there can only be televised jury deliberations, the process will be complete. Yet one of the great bulwarks of liberty is that a jury can acquit against the evidence and the directions of the judge because it reflects the ethical feeling of a community, kindled by a divine spark. Historically, the jury was a substitute for the judgment of God in ordeal or by battle. If trial juries are properly handled, they still catch the spark.

"* * * born of the fear of the Star Chamber and of the tyranny of the Stuarts. * * * It stands for a great principle, which is not to be whittled down or sacrificed.' Cardozo, J., in Clark v. United States, 289 U. S. 1, 17, 53 S. Ct. 465, 470, 77 L. Ed. 993."

The Court of Appeals in the instant case appears to hold that juror Hartman disqualified himself by his casual observation of some unidentified cattle nearly three years after the nuisance was abated and hence holds that the action of the Trial Court was proper, but the Court of Appeals in so holding ignores the fact that the information concerning juror Hartman was gathered by prohibited means. As this Court recognized in the **McDonald** case, quotient verdicts are improper but a court cannot look into the jury room to determine if quotient verdicts have been rendered. Thus, even if juror Hartman's visits to Blount County, Tennessee, were improper, the Court still cannot look into the jury room to ascertain that such visits were made. On the basis of the **McDonald** case, the **Stein** case, and the other authorities heretofore cited a trial court does not have the power to grant a new trial solely on the basis of affidavits and testimony of jurors relating to a remark made by a juror within the jury room during the jury's deliberations. Therefore, we submit that the Court of Appeals, by its decision, has in effect "whittled down or sacrificed" the long established sanctity of a jury's deliberations.

We most respectfully insist that if the decisions of the Court of Appeals in this case is permitted to stand the door will be opened for counsel and courts to conduct post-trial inquisitions of jurors and to make "what was intended to be a private deliberation the constant subject of public investigation".

II.

The Court of Appeals for the Sixth Circuit Has, in Effect, Decided the Procedural Question of Appealability of Orders Granting New Trials Contrary to the Decisions of the Supreme Court and of Other Courts of Appeals.

The Court of Appeals for the Sixth Circuit, in its opinion, stated that "an appeal does not lie from an order granting a new trial". While it is recognized that this statement expresses the general rule, nevertheless such statement does not take cognizance of the exception to the rule, which exception has been recognized by this Court and a number of the Courts of Appeals, namely that an appeal will lie from an order granting a new trial when the trial court lacks the jurisdiction or power to make such order.

This Court, in the case of **Phillips v. Negley** (1886), 117 U. S. 665, said (p. 671):

> "The vacating of a judgment and granting a new trial, in the exercise of an acknowledged jurisdiction, leaves no judgment in force to be reviewed. If, on the other hand, the order made was made without jurisdiction on the part of the court making it, then it is a proceeding which must be the subject of review by an appellate court."

In the later case of **Fairmount Glass Works v. Cub Fork Coal Company** (1933), 287 U. S. 474, this Court again said (p. 482):

> "Under certain circumstances the appellate court may inquire into the action of the trial court on a

motion for a new trial. Thus, its denial may be reviewed if the trial court erroneously excluded from consideration matters which were appropriate to a decision on the motion. Mattox v. United States, 146 U. S. 140, 36 L. ed. 917, 13 S. Ct. 50; Ogden v. United States (C. C. A. 3d), 112 Fed. 523; or if it acted on the mistaken view that there was no jurisdiction to grant it, or that there was no authority to grant it on the ground advanced. Felton v. Spiro (C. C. A. 6th), 78 Fed. 576, 581, 2 Am. Neg. Rep. 688; Dwyer v. United States (C. C. A. 9th), 170 Fed. 160, 165; Paino v. St. Paul Union Stockyards Co. (C. C. A. 8th), 35 F. (2d) 624, 626-628. It becomes necessary, therefore, to determine whether the circumstances of the case at bar justify an inquiry into the trial court's refusal to set aside the verdict."

In the case of **Freid v. McGrath** (1942), 133 F. 2d 350, the Court of Appeals for the District of Columbia Circuit said (p. 353):

"... it is urged that the Supreme Court has declared a rule which forbids review, by an appellate court, of the action of a federal trial court in granting a new trial. Obviously, there is no such rule of absolute and universal operation. Otherwise, the district court might grant new trials in cases over which it had never acquired jurisdiction, as in cases tried in the municipal court; or where it had lost jurisdiction, as in cases pending on appeal in this court or in the Supreme Court and in cases long since concluded, with judgments satisfied of record; all without let or hinderance, while this court and the Supreme Court must stand by powerless to act upon the appeals of despoiled litigants."

In the case of **Jackson v. Wilson Trucking Corp.** (1957), 243 F. 2d 212, the same Court of Appeals stated the same rule even more emphatically as follows (p. 214):

"An order granting a new trial is not ordinarily reviewable. But where, as in the case at bar, such an order exceeds the power of the court it may be reviewed notwithstanding the absence of a final judgment. Phillips v. Negley, 117 U. S. 665, 671, 6 S. Ct. 901, 29 L. Ed. 1013; Freid v. McGrath, 76 U. S. App. D. C. 388, 133 F. 2d 350."

See also:

Bailey v. Slentz et al. (C. A. 10, 1951), 189 F. 2d 406; **John E. Smith's Sons Company v. Lattimer Foundry & Machine Company** (C. A. 3, 1956), 239 F. 2d 815.

The legal proposition now under consideration is summarized in Moore's Federal Practice, Second Edition, Volume 6, Section 59.15 (1), as follows:

"To the general proposition that an order granting a new trial is non-appealable, an old line of authority makes the following exception: an order granting a new trial is appealable when the ground therefor is that the trial court lacked jurisdiction or power so to order."

Apparently the Court of Appeals for the Sixth Circuit did not recognize in this case the exception which is spelled out in the foregoing authorities. Hence, that Court has, in effect, laid down a procedural rule that is in conflict with the opinions of this Court and in conflict with the Courts of Appeals of other Circuits. Therefore, we submit that if the opinion of the Court of Appeals is permitted to stand in the instant case, litigants in the Sixth Circuit will be subject to a different procedural rule than are the litigants in other Circuits in reference to the appealability of the action of a trial court in granting a new trial in those instances where the trial court acted beyond its power or jurisdiction.

CONCLUSION.

We submit that the questions here involved are of importance to litigants and counsel in the Sixth Circuit. The result of the decision of which review is herein sought vitally affects the sanctity of the jury system and vitally affects the procedure in reference to the appealability of the action of a trial court in granting a new trial without having the power or jurisdiction to so act.

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

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